(4)

No. 03-6696

In the Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI
Petitioners,

v.

DONALD H. RUMSFELD, W.R. PAULETTE, Commander,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CERTAIN FORMER PRISONERS OF WAR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE GENEVA CONVENTIONS PROTECT ALL PARTIES TO CONFLICT, AS THE UNITED STATES HAS REPEATEDLY AFFIRMED, AND EXTEND IMPORTANT PROTECTIONS TO PERSONS CLAIMING TO BE PRISONERS OF WAR 4

II. FEDERAL COURTS MAY EXAMINE THE LAWFULNESS OF MILITARY CONFINEMENT OF AMERICANS WHO CLAIM PRISONER OF WAR STATUS 9

III. FAILURE TO ADHERE TO THE GENEVA CONVENTIONS ENDANGERS AMERICAN TROOPS AND CIVILIANS ABROAD 12

A. The United States Ratified the Geneva Conventions In Part to Protect Our Own Service Members 12

B. The United States Government's Strict Adherence to the Principles and Requirements of the Geneva Conventions Has Helped Save American Lives in Earlier Conflicts 13

C. Discarding the Principles Embodied in the Geneva Conventions Encourages Others to Do the Same, to the Detriment of International Law 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) 20, 23

Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003) 21

Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289 (2001) 9

In re Yamashita, 327 U.S. 1 (1946) 25

Lonchar v. Thomas, 517 U.S. 314 (1996) 9

Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003) 11

Smith v. Bennett, 365 U.S. 708 (1961) 9

Swain v. Pressley, 430 U.S. 372 (1977) 9

Statutes

101 Cong. Rec. 9960 (July 6, 1955) 13

Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) 10

Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009-546 (1996) 10, 11

U.S. Const. Art. VI 4

Treaties and Regulations

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-6(a) (1997) 7, 8

Dep't of the Navy, NWP 1-14M: *The Commander's Handbook on the Law of Naval Operations* 11-3 (1995) 8

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3356, 75 U.N.T.S. 287 20

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... 4, 5, 6, 7

Miscellaneous

George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42 (2000) 5, 13, 15

George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002) 16

Col. Fred L. Borch, *Review of Honor Bound*, 163 MIL. L. REV. 150 (2000) 15

John Cloud, *What's Fair in War?*, TIME, Apr. 7, 2003 17

Contemporary Practice of the United States Relating to International Law, 62 AM. J. INT'L L. 754 (1968) 8

Frank Davies, *U.S. Policy May Dilute Protection of POWs*, SAN JOSE MERCURY NEWS, Mar. 25, 2003 17

Dep't of Defense News Transcript, *Briefing on Geneva Convention, EPW's and War Crimes* (Apr. 7, 2003) 17

Dep't of Defense News Transcript, *Deputy Secretary Wolfowitz Interview with New England Cable News* (Mar. 23, 2003) 18

Dep't of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003)..... 17

Department of Defense, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (1992)..... 17

Dwight D. Eisenhower, CRUSADE IN EUROPE (1949) 16

Geneva Conventions of the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations, 84th Cong., 1st Sess., (1955)..... 12, 16

Judge Advocate General's School, OPERATION LAW HANDBOOK (O'Brien, ed. 2003)..... 8

Lawyers Committee for Human Rights, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES (Fiona Doherty & Deborah Pearlstein, eds. 2003)..... 23

Steve Levin, *International Law Often a Casualty*, PITTSBURGH POST-GAZETTE, Mar. 25, 2003 17

Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. TIMES, Oct. 8, 1993..... 19

Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999) 14

Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 HARV. INT'L L. J 301 (Winter 2003)..... 19

Steven Lee Myers, *Serb Officer, Captured by Rebels, Held by U.S.*, N.Y. TIMES, Apr. 17, 1999 18

Note, Safeguarding the Enemy Within, 71 FORDHAM L. REV. 2565 (2003)..... 14

Note: The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations, 15 ARIZ. J. INT'L & COMP. LAW 871 (1998)..... 19

Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary, 107th Cong., 1st Sess. (2001)..... 22

Maj. Gen. George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-73 (Dep't of the Army 1975) .. 14

S. Rep. No. 84-9 (1955) 12, 16

Rowan Scarborough, *Powell Wants Detainees to be Declared POWs*, WASH. TIMES, Jan. 26, 2002 20

Katharine Q. Seelye, *Powell Asks Bush to Review Stand on War Captives*, N.Y. TIMES, Jan. 27, 2002..... 20

Andrew Stephen, *NS Profile: Colin Powell*, NEW STATESMAN, Dec. 16, 2002 20

Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 648 (2002) 5, 22

Michel Veuthey, *The American Red Cross-Washington College of Law Conference*, 33 AM. U.L. REV. 83 (1983) 13

White House Release, *President Discusses Military Operation* (Mar. 23, 2003) 18

White House Release, *Statement by the Press Secretary on the Geneva Convention* (May 7, 2003) 17

INTEREST OF THE *AMICI CURIAE*[1]

Amici are former U.S. soldier prisoners of war whose lives have been deeply affected by our enemies' compliance, or failure to comply, with the mandates of the Geneva Conventions.

Amici take no position on whether petitioner Hamdi ("Petitioner") has committed acts that warrant treatment as an enemy combatant.[2] Nevertheless, they file this brief to urge this Court to examine and reverse the Fourth Circuit's refusal to allow a U.S. citizen allegedly detained in a war zone the opportunity to challenge before a competent tribunal his exclusion from the protections of the Geneva Conventions.

Douglas "Pete" Peterson served as a fighter pilot and commander in the U.S. Air Force from 1954-1981 and attained the rank of full colonel. In 1966, he was shot down over North Vietnam and spent six and a half years as a prisoner of war. From 1997-2002, Mr. Peterson served as U.S. Ambassador to Vietnam. Prior to his ambassadorship, he served three terms as a U.S. Congressman.

Leslie H. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans organization that represents approximately 50,000 former prisoners of war and their families. When his B-17 bomber crashed on April 24, 1944, Mr. Jackson was captured by the German Army and transferred to a converted concentration camp. While the experience was harsh, Mr. Jackson's

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation and submission of this brief.

[2] *Amici* use the term "enemy combatant" to mean a member of the armed forces of a nation with which the United States is at war.

captors treated him in accord with the Geneva Conventions of 1929. Mr. Jackson believes that his survival and health while in captivity are the result of the German Army's adherence to the 1929 Geneva Conventions.

The experiences of Edward Jackfert and Paul Reuter offer a sharp contrast. Mr. Jackfert is former National Commander of American Defenders for Bataan & Corregidor, Inc. ("American Defenders"), an organization providing support for prisoners of war held by the Japanese during World War II. Mr. Reuter is the National Adjutant and Legislative Officer for the American Defenders. In 1942, both men were taken prisoner by Japan, which did not purport to follow the 1929 Geneva Conventions. Mr. Reuter was forced to take part in the horrific Bataan Death March; Mr. Jackfert, similarly, was subject to a mass transportation of Allied prisoners of war via a "hell ship" from the Philippines to Japan. Each man was forced into slave labor. During their years of captivity, they saw their compatriots starved, beaten and killed.

SUMMARY OF ARGUMENT

For decades the United States has endeavored to ensure the safety and well-being of its citizens when they are captured by hostile forces. Those efforts are now at risk. The issue is whether an American citizen, apparently captured on a field of battle, may be denied by his own country the protections long accorded to those taken prisoner by the United States in wartime, without running afoul of our obligations under the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"). Failure to abide by the terms of the Geneva Conventions in this case not only deprives Petitioner of the rights to which he is entitled, it increases the likelihood that other nations will fail to follow Convention protections in the treatment of Americans taken prisoner overseas.

Petitioner was captured by Northern Alliance forces during fighting in Afghanistan, and was later turned over to the United States military for detention. The United States declined to designate Petitioner a "prisoner of war" or to extend to Petitioner the full rights due to POWs under international law, including access to a "competent tribunal" to determine his status. Instead, Petitioner has been detained indefinitely, virtually incommunicado, deprived even of the opportunity to challenge the particulars of his designation as a combatant.

Merely branding a detainee a "terrorist" does not place the person in a lawless twilight zone unprotected by either the criminal justice system or the laws of war. Indeed, the government has never even asserted that Petitioner is a "terrorist." He was captured on a battlefield. This is enough to give him the presumptive status of a POW, with all of the rights and protections accorded that status, unless and until a "competent tribunal" established under the GPW finds that he is not entitled to this status.

Unless the federal courts exercise their authority to review the lawfulness of Petitioner's detention and his right to be treated as a POW under the international treaty to which the United States is bound, Petitioner's treatment will establish a precedent that jeopardizes the safety of all Americans who may find themselves taken prisoner in the course of armed conflict.

Americans troops are regularly dispatched on a wide variety of missions throughout the world. Despite our nation's best efforts, some of these troops eventually will face hostile situations and some may be captured, as has happened in the last decade alone in such disparate theaters as Serbia, Iraq, Somalia and China. American civilians travel throughout the world and may also find themselves taken prisoner by our country's enemies. It is unquestionably in our national interest that captured Americans be provided the full protections to which they are entitled under international law. Our gov-

ernment's failure to abide by our obligations under the Geneva Convention seriously undermines this national interest.

Amici accordingly urge this Court to reverse the decision of the U.S. Court of Appeals for the Fourth Circuit, and to enforce the United States' binding obligation to abide by the Geneva Convention.

ARGUMENT

I. The Geneva Conventions Protect all Parties to Conflict, as the United States has Repeatedly Affirmed, and Extend Important Protections to Persons Claiming to Be Prisoners of War.

In the aftermath of World War II, nations throughout the world ratified the four Geneva Conventions. These four conventions grew out of an existing body of humanitarian law, including the 1929 Geneva Conventions offering similar protection, and created a comprehensive code of international law to regulate the conduct of war and, most importantly, to ensure that all persons detained during armed combat – whether combatants or civilians – are afforded significant legal protection. Of particular relevance, Article 3 common to each Convention generally forbids "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War ["GPW"], Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 *et seq.*, Art. 3(1)(d).

Because they have been ratified by the United States, the four Geneva Conventions are the supreme law of the land. U.S. Const. Art. VI. The United States has abided by both the spirit and letter of the Conventions in its applicable policies, procedures, and regulations. The United States military, for example, has incorporated language from the GPW into

its military regulations. It also consistently has adhered to the requirements of the GPW in every conflict since World War II. The government, likewise, has publicly affirmed the validity and usefulness of the Conventions whenever Americans abroad have been captured. Such support for the Conventions is due, at least in part, to the recognition that the Conventions help save American lives.

The GPW, in particular, affords captured soldiers both substantive and procedural protections meant to ensure each detainee's safety and dignity, and the GPW's provisions apply broadly. Article 4 of the GPW defines "prisoners of war" to include "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces," together with "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." Furthermore, the GPW recognizes as potential POWs citizens who join armed units when "on the approach of the enemy [they] spontaneously take up arms to resist the invading forces." GPW, art. 4; *see also* Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 648, 756-57 & n.685 (2002) ["*Trials and Tribulations*"] (stressing that argument that Taliban fighters are not POWs is "virtually meritless" and serves to raise "serious dangers for our own soldiers"); George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 43-44 (2000) ["*Laws of War*"] (discussing Article 4).

Article 5 of the GPW imposes a presumptive requirement that every alleged combatant be treated as a prisoner of war, with all the protections that flow from that status, unless and until a "competent tribunal" reaches a contrary determination. Thus, all contracting parties, including the United States, must treat those captured in the course of armed conflict as POWs "from the time they fall into the power of the enemy and until their final release and repatriation." GPW,

Art. 5. There is one – and only one – exception to that requirement:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [deserving of POW status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." *Id.* at 3324 (emphasis added).

Nor is the POW designation merely academic. POW designation governs the manner in which a detained person may be treated and affords POWs many rights to which they otherwise may not be entitled during time of conflict. Under the GPW, for example, a prisoner of war may "only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." GPW, art. 12. POWs must be "humanely treated" and must be protected "against acts of violence or intimidation and against insults and public curiosity." *Id.*, art. 13. POWs are entitled "in all circumstances to respect for their persons and their honor" and shall "retain the full civil capacity which they enjoyed at the time of their capture" to the extent possible. *Id.*, art. 14. Nor may a POW be discriminated against on basis of gender, race, religion, or other such distinction. *Id.*, arts. 14, 16. POWs are required to provide no more that "surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information." *Id.*, art. 17. They cannot be coerced to answer further and may not be "threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind" should they refuse. *Id.*

Moreover, POWs may not be "interned in penitentiaries" unless incarceration is necessary to protect their safety. *Id.*, art. 22. Rather, "[p]risoners of war shall be quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area," (*id.*, art. 25), and shall have access to such benefits as the ability to prepare their own meals, (*id.*, art. 26), access to a canteen, (*id.*, art. 28), monthly medical inspections, (*id.*, art. 31), "complete latitude in the exercise of their religious duties," (*id.*, art. 34), and "opportunities for taking physical exercise, including sports and games, and for being out of doors," (*id.*, art. 38). In short, the GPW prohibits contracting parties from treating detainees who are presumed to be POWs as criminals and prohibits the detaining power from confining the detainees in conditions resembling a civilian or military prison.

The United States has recognized the significance of the POW designation in its military regulations and consistently has adhered to these obligations in past military conflicts. The United States Army, for example, has incorporated the GPW directly into its binding regulations on the treatment of wartime detainees:

> "In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, *such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*" Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees*

and Other Detainees § 1-6(a) (1997) (emphasis added).[3]

Even those detainees "not appearing to be entitled to prisoner of war status" have the right to assert their claim for determination by a competent tribunal. *Id.* § 1-6(b); *see also* Dep't of the Navy, NWP 1-14M: *The Commander's Handbook on the Law of Naval Operations* 11-3 (1995) (providing that even "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated"). The United States regularly has conducted so-called Article 5 hearings to determine whether captured persons should be accorded POW status under the Geneva Conventions. *See, e.g.*, Judge Advocate General's School, OPERATION LAW HANDBOOK 22 at n.2 (O'Brien, ed. 2003) (discussing hearings conducted during first Gulf War); *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT'L L. 754, 768-75 (1968) (discussing hearings conducted during Vietnam War).

In sum, there is a well-developed set of legal doctrines, based on international treaty obligations, that provide both substantive protections to POWs and the process for determining the right to POW status. Detention that disregards both the substantive protections to which POWs are entitled and the process due for determining claims to that status is clearly unlawful.

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[3] This regulation was jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force and Marine Corps, Washington, D.C., October 1, 1997.

II. Federal Courts May Examine The Lawfulness Of Military Confinement Of Americans Who Claim Prisoner Of War Status[4]

Petitioner, by applying for a writ of habeas corpus, seeks judicial review of the government actions that have led to his confinement both incommunicado and without charge. The writ should issue. Meaningful judicial review is entirely appropriate where the conduct in question, if permitted to stand, would violate the United States' obligations under international law, to the detriment of one of its own citizens. Certainly there can be no argument here that Petitioner's right to the writ can be validly curtailed because he has not yet exhausted other avenues of relief. Petitioner has been afforded no other avenues of review whatsoever.

The writ of habeas corpus has been described as the "highest safeguard of liberty." *Smith v. Bennett*, 365 U.S. 708, 712 (1961) (*quoted in Lonchar v. Thomas*, 517 U.S. 314, 322 (1996)). Dismissal of the writ "denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar*, 517 U.S. at 325. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 301 (2001) (citing cases); *see also Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("the traditional Great Writ was largely a remedy against ex-

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[4] *Amici* recognize that the parties will brief the legal question of whether this Court has jurisdiction to hear this case. *Amici* do not with to repeat those arguments and do not here submit a comprehensive analysis of the applicable law of jurisdiction. Rather, *amici* here illustrate the distinction between past review of applications for the writ of habeas corpus and the circumstances of the instant case.

ecutive detention"). The wrongs for which Petitioner seeks redress go to the heart of the Executive Branch's power to detain Petitioner and, if he may be detained, whether the writ should be available to determine the process that is due to ascertain the legal rights attached to his status as a detainee.

Although Congress has from time to time passed legislation restricting the applicability of the writ, such limitations nevertheless comport with underlying principles of due process. Not surprisingly, Congress has made no attempt to divest the federal courts of their historic power to examine the justification for Executive detention, when – as in this case – no other tribunal, civilian or military, has adjudicated the lawfulness of the detention and the grounds for confinement. Congress' recent efforts to limit access to the writ all presuppose that the applicant for the writ already has enjoyed the benefit of a fair judicial or administrative tribunal that adjudicated the grounds for continued detention. For example, the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996), limits the extent to which a claimant may petition a federal court for a writ of habeas corpus, but nevertheless permits a application once the petitioner has "exhausted the remedies available in the courts of the State" in which he or she is being held, or otherwise was not permitted to exhaust any available state remedies. *See* 28 U.S.C. § 2254(b)(1) (2003); *see also* 28 U.S.C. § 2264(a) (limiting federal court review of applications by capital defendants to those claims that have been "decided on the merits in State courts," subject to exceptions). Likewise, the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (1996), curtails federal jurisdiction with regard to certain offenses involving aliens. *See, e.g.*, 8 U.S.C. 1252(a)(2)(C) (2003) (forbidding judicial review of final deportation order against an alien found removable for having committed certain enumerated offenses). Again, however, aliens falling under this act's scope are provided administrative remedies by which to

test the lawfulness of their detention. *See, e.g.*, 8 U.S.C. §§ 1225(b), (c) (providing mechanism for review of determination that arriving aliens are deportable).

In the present case, by contrast, Petitioner has been afforded no opportunity to plead his case. Thus the government should not curtail his right to petition for a writ of habeas corpus. The right to have a "competent tribunal" adjudicate Petitioner's claim to POW status under the GPW is clear, yet he has been denied both that right and the means to contest the denial of that status.

This case was filed in the Eastern District of Virginia, where Respondent Secretary of Defense is located. *See Padilla v. Rumsfeld*, 352 F.3d 695, __, 2003 U.S. App. LEXIS 25616,*34-*35 (2nd Cir. 2003) (acknowledging government's argument that Secretary Rumsfeld is "located in the Eastern District of Virginia"). A federal district court with personal jurisdiction over the government representatives responsible for Petitioner's treatment has the power – and the responsibility – to issue a writ of habeas corpus to determine whether the detaining officials have complied with the procedures that the GPW establishes as the governing standard for judging the lawfulness of the detainee's confinement.

As we next discuss, the compelling national interest in protecting Americans taken prisoner by hostile powers provides a powerful justification for concluding that the federal courts have both the authority and the duty to ensure that the United States complies with its obligations under the GPW.

III. Failure To Adhere To The Geneva Conventions Endangers American Troops And Civilians Abroad.

A. The United States Ratified the Geneva Conventions In Part to Protect Our Own Service Members.

The integrity of the Geneva Conventions is crucial to the safety and security of U.S. troops and civilians abroad, as the ratifiers themselves recognized:

> "If the end result [of ratification] is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain." S. Rep. No. 84-9, at 32 (1955) ["Ratifying Report"]

The United States played a "major role both in the preparatory steps and in the conference proceedings" for the Geneva Conventions. *Geneva Conventions of the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess., at 3-4 (1955) ["Senate Hearing"] (statement of Robert Murphy, Deputy Under Secretary of State). Senate debate on the Geneva Conventions makes plain that the Senate's decision to ratify was animated in large part by the belief that American compliance with the Geneva Conventions would encourage our enemies to reciprocate in their treatment of American POWs, civilians, and others.

For example, as Secretary of State John Foster Dulles explained, American "participation is needed to . . . enable us to invoke [the Geneva Conventions] for the protection of our nationals." *See, e.g., id.* at 61. Senator Mike Mansfield

agreed, arguing that while American "standards are already high":

> "The conventions point the way to other governments. Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people . . . ." 101 Cong. Rec. 9960 (July 6, 1955).

B. The United States Government's Strict Adherence to the Principles and Requirements of the Geneva Conventions Has Helped Save American Lives in Earlier Conflicts.

Reciprocity – the expectation that acting in a humanitarian manner may encourage one's enemy to do the same – remains "a powerful actual factor" in the application of international humanitarian law. Michel Veuthey, *The American Red Cross-Washington College of Law Conference*, 33 AM. U.L. REV. 83, 89 (1983). Treating those captured in a war zone, such as Petitioner, in accordance with basic shared standards means that our own captured forces stand a much better chance of surviving captivity unharmed. Ignoring that reality not only contravenes the plain text of the GPW, but also places Americans around the world at grave risk of precisely the type of mistreatment the Geneva Conventions aim to prevent.

1. The enlightened self-interest behind ratification of the Geneva Conventions has proven effective in conflicts preceding the "war on terrorism." Thousands of Americans were taken prisoner during the Vietnam War. Even though North Vietnam publicly asserted that all American POWs were war criminals, and hence not entitled to the protections of the GPW, (*Laws of War* at 62 n.100), the United States applied the Geneva Conventions' principles to all enemy POWs – both North Vietnamese regulars and Viet Cong – in part to try to ensure "reciprocal benefits for American

captives." Maj. Gen. George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-73, at 63 (Dep't of the Army 1975); *see also* 64 DEP'T OF STATE BULL. 10 (Jan. 4, 1971) (White House statement announcing President Nixon's call for application of the 1949 Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam and elsewhere in Southeast Asia"); *Note, Safeguarding the Enemy Within*, 71 FORDHAM L. REV. 2565, 2574 (2003) (noting U.S. Army's establishment of widespread Article 5 tribunals in Vietnam to adjudicate POW status of enemy detainees).

Former Vietnam POWs, and others, assert to this day that the United States government's adherence to the principles of the Geneva Conventions helped protect them. As Senator (and ex-POW) John McCain explained on the fiftieth anniversary of the Geneva Conventions:

> "The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war. And I thank God for that. I am thankful for those of us whose dignity, health and lives have been protected by the Conventions . . . . I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war."[5]

Others likewise assert that the American adherence to the Geneva Conventions in Vietnam saved American lives:

[5] Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999), *available at* http:/www.senate.gov/~mccain/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id=820.

> "[A]pplying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While the enemy never officially acknowledged the applicability of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of [that]." Col. Fred L. Borch, *Review of Honor Bound*, 163 MIL. L. REV. 150, 152 (2000).

George H. Aldrich was the State Department lawyer responsible for applying international humanitarian law during the Vietnam War, and was also Secretary of State Kissinger's legal advisor for the negotiation of the 1973 peace agreement between the United States and North Vietnam. *Laws of War*, at 62 n.99. He has noted:

> "My experience with the law in the Vietnam War and my subsequent thoughts about it have convinced me that, whenever a state chooses to send its armed forces into combat in a previously noninternational armed conflict in another state – whether at the invitation of that state's government or of the rebel party – the conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all of the laws governing international armed conflicts. *Id.* at 62.

The Vietnam experience demonstrated to American authorities, who were "painfully aware of the experiences in Korea and Vietnam," the benefits to Americans of full compliance with the Geneva Conventions. George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 898 (2002) ("[I]t would be much easier and more convincing for the United States to conclude that the members of the armed forces of the effective government of most of Afghanistan [as of September 11, 2001] should, upon capture, be treated as POWs. This is what we did in Vietnam, where we found it desirable to give virtually all enemy prisoners POW status.").

Although Vietnam-era statements regarding the importance of the Geneva Conventions are common, they are hardly unique. On the contrary, since World War II the United States has repeatedly reaffirmed the importance of the Conventions, in general, and of the GPW, in particular. General Eisenhower, for example, pointedly explained that the Western Allies treated German prisoners in accordance with the principles of international humanitarian law because "the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing." Dwight D. Eisenhower, CRUSADE IN EUROPE 469 (1949).

Similarly, during the Korean War the "moral acceptance of the conventions as a general norm did have some effect" on both American and North Korean treatment of POWs, even though neither side had then ratified the GPW. Senate Hearing, at 5 (statement of Deputy Under Secretary of State Murphy); *see also* Ratifying Report, at 31 (noting that while "the treatment of our soldiers captured in Korea by the Communists was in many respects ruthless and below civilized norms, . . . without the convention, that treatment could have been still worse").

The United States government's allegiance to the principles enshrined in the Geneva Conventions has continued even in our most modern conflicts. During the 1991 Gulf War, the United States armed forces readily afforded full protection under the Geneva Conventions to the more than 86,000 Iraqi POWs in its custody. Dep't of Defense News Transcript, *Briefing on Geneva Convention, EPW's and War Crimes* (Apr. 7, 2003). Almost 1,200 Article 5 hearings were conducted, resulting in 886 prisoners being determined to be civilians. Department of Defense, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 578 (1992).

During the present conflict in Iraq, the government has stressed that it "believes in the principles and in the law of the Geneva Convention," and that "America's values . . are reflected in the Convention." White House Release, *Statement by the Press Secretary on the Geneva Convention* (May 7, 2003). Dozens of Article 5 tribunals were convened within the first two months of the 2003 Iraq War. Department of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003).

It is thus unsurprising that contemporary experts have embraced this same lesson of U.S. history in wartime: treating one's enemy in accordance with the Geneva Convention encourages like protection of one's own captured troops. Steve Levin, *International Law Often a Casualty*, PITTSBURGH POST-GAZETTE, Mar. 25, 2003, at A-9 (noting Prof. Jules Lobel's statement that it "is in every country's interest to treat prisoners in accordance with the Geneva Convention because soldiers in your army could be taken prisoner, too"); Frank Davies, *U.S. Policy May Dilute Protection of POWs*, SAN JOSE MERCURY NEWS, Mar. 25, 2003, at A-7 (comment by Eugene Fidell, director of National Institute of Military Justice, that showing Iraqi POWs in U.S. media "really complicates matters when you're trying to build a case about the treatment of your own POWs"); *see also* John Cloud, *What's Fair in War?*, TIME, Apr. 7, 2003, at 66 (arguing that U.S.

should apply GPW in Iraq because "it is that very document that could help those young American captives get home safe").

2. In addition to upholding the principles of the Geneva Conventions itself, the United States routinely demands that foreign parties do the same. Often the United States makes such demands for the stated purpose of protecting Americans abroad. For example, after American soldiers were captured during the 2003 Iraq War and abused, the United States condemned Iraqi treatment of American POWs as violating the GPW and contrasted it to the United States' own treatment of prisoners it has taken. President Bush demanded that American POWs in Iraq "be treated humanely . . . just like we're treating the prisoners that we have captured humanely." White House Release, *President Discusses Military Operation* (Mar. 23, 2003). Deputy Secretary of Defense Wolfowitz likewise invoked the Geneva Conventions when objecting to Iraqi treatment of U.S. POWs: "We've seen those scenes on Al Jazeera that others have seen. We have reminded the Iraqis . . . that there are very clear obligations under the Geneva Convention to treat prisoners humanely . . . . We treat our own prisoners, and there are hundreds of Iraqi prisoners, extremely well." Dep't of Defense News Transcript, *Deputy Secretary Wolfowitz Interview with New England Cable News* (Mar. 23, 2003).

Similarly, when American soldiers were taken prisoner during NATO military action against Serbia in 1999 and quickly shown on Serbian television beaten and humiliated, the United States immediately demanded that these soldiers be treated as prisoners of war under the Geneva Convention; moreover, the Department of Defense was quick to contrast Serbia's mistreatment of American POWs with the humane treatment afforded Serbian POWs under the Geneva Convention. Steven Lee Myers, *Serb Officer, Captured by Rebels, Held by U.S.*, N.Y. TIMES, Apr. 17, 1999, at A9.

The United States has demanded that American POWs be treated in conformance with the Geneva Conventions even in situations where the GPW may not have been applicable. In 1993 in Somalia, for example, an American and a Nigerian soldier were both captured by forces loyal to warlord Mohammad Farah Aideed while part of a humanitarian mission to that devastated region. Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. TIMES, Oct. 8, 1993, at A16 ["*Refuses to Exchange*"]. International observers generally agreed that, at the time of the capture, Somalia had no functioning government, meaning that there was no "state" party obligated to treat the captured American and Nigerian in accordance with the GPW. See Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 HARV. INT'L L. J 301, 310 (Winter 2003). Nevertheless, the United States not only demanded that these two soldiers be treated in accordance with the Geneva Conventions, but further stressed that those Somali fighters captured by the United States – neither American, nor fighting on behalf of an organized government – would be treated as prisoners of war under the Geneva Convention. *See Refuses to Exchange, id.*; *see also Note: The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations*, 15 ARIZ. J. INT'L & COMP. LAW 871, 891 & n.177 (1998) ("The factions at war in Somalia were not trained soldiers. Instead, '[t]he typical Somali fighter [was viewed] as an [u]ntrained, undisciplined teen-ager with a contraband weapon and no field support or political allegiance.") (internal citations omitted). Petitioner is entitled to, and should receive, no less.

3. It is only in the context of more recent efforts to combat terrorism that the Executive Branch appears to have lost sight of both its legal obligations and the long-range interests of our own troops and citizens. Within months of the September 11 attacks, Secretary of State Colin Powell, retired U.S. Army General and former Chairman of the Joint

Chiefs of Staff, recognized that the Geneva Conventions applied to Al Qaeda and Taliban fighters captured in Afghanistan, and he declared that those captured fighters would have the opportunity to have their status adjudicated by a competent tribunal, as required by the GPW. Rowan Scarborough, *Powell Wants Detainees to be Declared POWs*, WASH. TIMES, Jan. 26, 2002, at A1; Katharine Q. Seelye, *Powell Asks Bush to Review Stand on War Captives*, N.Y. TIMES, Jan. 27, 2002, at A1; *see also* Andrew Stephen, *NS Profile: Colin Powell*, NEW STATESMAN, Dec. 16, 2002, *passim* (discussing Secretary Powell's military career). Why the government has failed to observe these obligations in the instant case remains unclear. Regardless, it disserves the interests of American troops and civilians who will find themselves seized by hostile forces in the future.

Moreover, the interests of American citizens caught up in hostilities extend beyond military combatants. Like the GPW, the fourth of the Geneva Conventions, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3356, 75 U.N.T.S. 287 ["Fourth Convention"], confers upon non-combatants various substantive and procedural protections designed to check a detaining power's mistakes. Although the Fourth Convention recognizes that it may be possible for a nation's security to be so threatened that it may validly suspend full application of the rights of the Fourth Convention to a given civilian, the Fourth Convention nevertheless emphasizes that any such suspension is temporary: "[S]uch persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention." *Id.*, art. 5.

The court below held that the Convention rights of anyone apprehended in a war zone, whether soldier or civilian, may be protected only by diplomatic intervention from the apprehended person's own country – whether or not that country is the detaining power. *Hamdi v. Rumsfeld*, 316 F.3d

450, 468-69 (4th Cir. 2003) [hereinafter *Hamdi III*]. As Judge Luttig warned, however, this interpretation has dire consequences:

> "The embedded journalist or even the unwitting tourist could be seized and detained in a foreign combat zone. Indeed, the likelihood that such could occur is far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state." *Hamdi v. Rumsfeld*, 337 F.3d 335, 358 (4th Cir. 2003) (Luttig, J., dissenting).

Thus, if a hostile power chooses to follow the lead of the American government in this case, these unwitting detainees may find themselves held without charge, for an indefinite period of time. Indeed, the government's position even extends to civilians seized by our forces and declared "terrorist supporters." As Judge Motz pointed out, the ruling below would mean that "any American citizen" seized in a part of the world where American troops are present . . . could be imprisoned indefinitely . . . if the Executive asserted that the area was a zone of active combat." *Id.* at 372 n.3 (Motz, J., dissenting).

C. Discarding the Principles Embodied in the Geneva Conventions Encourages Others to Do the Same, to the Detriment of International Law.

These concerns about the welfare of Americans abroad are hardly academic. The United States has a vested interest in following both the letter and the spirit of the Geneva Conventions in order to avoid taking any steps that would encourage other nations to discard the Conventions' principles.

The Defense Department's clear departure from its established practice in its treatment of Petitioner and others similarly situated not only lowers the bar for its own conduct, it

encourages authoritarian regimes around the globe to commit abuses in the name of counter-terrorism.

Even before September 11, 2001, the United States recognized the threat extrajudicial practices posed to Americans abroad. The United States, for example, objected to the military trial of American Lori Berenson, detained by Peruvian authorities on charges of terrorism; the United States deplored the relative lack of due process safeguards afforded Ms. Berenson under the military trial procedure. *Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong., 1st Sess., at 2001 WL 26187921 (Nov. 28, 2001) (testimony of Scott L. Silliman, Professor of Law) ("There seems little difference in the measure of due process afforded Berenson in Peru and what is called for under the President's military order [regarding enemy combatants seized in Afghanistan], and I believe this opens us up to a charge of hypocrisy from the international community."); *see also Tribunals and Tribulations*, at 759 n.695 (providing State Department's 1999 description of deficiencies in Peru's military trials).

Since September 11, 2001, these concerns have multiplied. The following regimes, among others, have acted to suppress lawful dissent and quell political opposition, all the while self-consciously invoking the very language the United States has used in justifying its treatment of individuals such as Petitioner: Egypt (where President Mubarak endorsed a diminished post-September 11 concept of the "freedom of the individual"); Liberia (where then-President Taylor ordered a critical journalist declared an "enemy combatant," jailed, and tortured); Zimbabwe (where President Mugabe, while voicing agreement with the Bush Administration's policies in the war on terror, declared foreign journalists and others critical of his regime "terrorists" and suppressed their work); Eritrea (where the governing party arrested 11 political opponents, has held them incommunicado and without charge, and defended its actions as being consistent with United States actions after September 11); and China (where the Chinese government charged a peaceful political activist with terrorism and sentenced him to life in prison; the U.S. State Department noted "with particular concern the charge of terrorism in this case, given the apparent lack of evidence [and] due process"). See Lawyers Committee for Human Rights, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES, at 77-80 (Fiona Doherty & Deborah Pearlstein, eds. 2003).

Regardless whether these regimes are currently at peace with the United States, the time may come when their nations become hostile ground. Americans some day may be captured or detained in these locations as a result of actions arising out of, or incident to, military operations. The Defense Department's decision to deny Petitioner access to a competent tribunal to adjudicate his case will only serve to harm the future interests of Americans in these countries and around the world. Although the court below erred in rejecting the applicability of the Geneva Conventions, the court correctly noted the Conventions' purpose:

> "There is a powerful and self-regulating national interest in observing the strictures of the [Geneva] Convention, because prisoners are taken by both sides of any conflict. This is the very essence of reciprocity and, as the drafters of the Convention apparently decided, the most appropriate basis for ensuring compliance." *Hamdi III*, at 469.

Reciprocity is as important now as it was when the Geneva Conventions were created over fifty years ago. American servicemembers can proudly serve their country knowing that their country has fought, tooth and nail, to ensure that the Conventions protect them. When the United States departs from its established practice, rejects those aspects of the Conventions that it believes to be too burdensome or incon-

venient – and thereby encourages less noble actors to do the same – innocent Americans may ultimately pay the price.

* * * * * *

The question presently facing this Court is a momentous one. Two and one-half years after his capture, Petitioner languishes in a jail cell, virtually incommunicado, neither charged with, nor tried for, nor convicted of any crime. Petitioner has been deprived of any opportunity to challenge the denial of his POW status. The Defense Department insists that no charge or hearing is necessary and intimates that none may be forthcoming. Petitioner's American citizenship apparently is treated as irrelevant. Such conduct represents a radical departure from this nation's traditions. If allowed to stand, it would cause lasting damage not only to Petitioner, but to all Americans worldwide, now and in the future, who may some day be captured or detained by hostile forces and deserve the law's full protection.

Only months after the end of World War II, when that conflict's terrible suffering was fresh in the minds of every American, Justice Rutledge, in language equally applicable today, warned his fellow citizens against withholding the right to due process from America's enemies:

> "[T]here can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

> "This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes' never rose." *In re Yamashita*, 327 U.S. 1, 41-42 (1946) (Rutledge, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2004